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# APEX COMMUNICATIONS SDN BHD v. SUMBER KHAZANAH SDN BHD & ANOTHER APPEAL (IN LIQUIDATION)

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COURT OF APPEAL, PUTRAJAYA
WAN AHMAD FARID SALLEH CJ
AZIZAH NAWAWI CJ (SABAH & SARAWAK)
AZIMAH OMAR JCA
[CIVIL APPEAL NOS: W-02(IM)(C)-1547-09-2023
& W-02(IM)(C)-1704-10-2023]
13 NOVEMBER 2025

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**Abstract** – *(i) An arbitration clause conceptually is a separate and distinct agreement than that of the substance of the main agreement. However, this conceptual separation does not by any means remove or isolate the arbitration clause from becoming 'a term' within the main agreement. Further, it has never been the law that the assignment of all of a contract's terms would require express inclusion (or exclusion) of the arbitration agreement; (ii) The word 'may' in an arbitration clause cannot be read in a silo without properly appreciating the surrounding clauses which effectively present and prescribe the actual options that are made available. If an arbitration clause imposes mandatory reference to arbitration, then it is well within a party's contractual rights to ensure that the other party does not derail away from its mutual agreement to mandatorily refer the dispute to arbitration*

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***CONTRACT:*** *Arbitration clause – Incorporation into subcontract – Whether arbitration clause within same singular unit as main agreement – Whether 'all terms' of subcontract include arbitration clause – Whether entirety of terms and conditions of subcontract assigned from one party to another via contractual assignment – Whether there was contradiction between arbitration clause and exclusive jurisdiction clause – Lex contractus – Lex arbitri – Whether arbitration clause and exclusive jurisdiction clause within subcontract enforceable – Whether parties estopped from denying applicability and relevance of arbitration clause – Whether mandatory for parties to refer dispute to arbitration – Whether there ought to be harmonious interpretation upholding mutually agreed arbitration agreement*

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***CONTRACT:*** *Terms – Arbitration clause – Incorporation into contract – Whether 'all terms' of contract include arbitration clause – Whether entirety of terms and conditions of subcontract assigned from one party to another via contractual assignment – Whether there was contradiction between arbitration clause and exclusive jurisdiction clause – Lex contractus – Lex arbitri – Whether arbitration clause and exclusive jurisdiction clause within contract enforceable – Whether parties estopped from denying applicability and relevance of arbitration clause – Whether mandatory for parties to refer dispute to arbitration – Whether there ought to be harmonious interpretation upholding mutually agreed arbitration agreement*

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***WORDS & PHRASES:*** *'may' – Interpretation – Arbitration clause – Whether carried directory (optional) meaning – Whether arbitration clause allowed for other modes of dispute resolution – Whether word 'may' read in silo – Whether ought to be read with appreciation of surrounding clauses – Lex contractus – Lex arbitri – Whether there was contradiction between arbitration clause and exclusive jurisdiction clause – Whether mandatory for parties to refer dispute to arbitration – Whether there ought to be harmonious interpretation upholding mutually agreed arbitration agreement*

***CIVIL PROCEDURE:*** *Extension of time – Request for – Whether indication of unequivocal abandonment of right to arbitration – Whether request of extension of time to prepare defence fell within confines of s. 10(c) of Arbitration Act 2005*

UEM Construction Sdn Bhd appointed Apex Communications Sdn Bhd ('Apex/defendant') as the first layer subcontractor to execute and complete a project known as Package 8: construction and completion of elevated stations and other associated works at Saujana Impian, Bandar Kajang ('S8 package') *via* a contract ('first subcontract'). Apex appointed Ikatan Engineering Sdn Bhd ('IESB') as the second layer subcontractor to execute and complete the S8 package ('second subcontract'). The arbitration clause (cl. 38) and the exclusive jurisdiction clause (cl. 39) were contained within this second subcontract. IESB appointed Sumbertech Ventures Sdn Bhd ('SVSB') as the third layer subcontractor to execute and complete the S8 package *via* a letter of appointment ('IESB LA'). Although later, SVSB's position as the third layer subcontractor was assigned to Sumber Khazanah Sdn Bhd ('SKSB/plaintiff') at IESB's request. Thus, under the IESB LA, SKSB covenanted to strictly follow and comply with all terms and conditions of the second subcontract (without any express exclusion of the arbitration clause or the exclusive jurisdiction clause). In furtherance of the assignment of the IESB LA from SVSB to SKSB, IESB requested Apex (as the first layer subcontractor) to make all payments directly to SKSB. Apex approved and acknowledged the 'direct assignment' of the S8 package to SKSB as well as the direct payment arrangement to SKSB as requested by IESB. Disputes began to arise regarding the certification or under-certification of works allegedly performed by SKSB. SKSB commenced its action at the High Court against Apex for alleged unpaid works to the amount of RM33, 314,908.39 and for the release of the performance bond to the sum of RM1,824,941.78. Apex entered its memorandum of appearance and requested for an extension of time to review documents, prepare a defence and to obtain obstructions. The court granted the first and second extension of time. Apex issued a letter to SKSB informing of Apex's intention to invoke cl. 38(1)(c) of the second subcontract ('arbitration clause') and refer the dispute for arbitration. SKSB never responded or replied to this letter. Due to SKSB's non-response to Apex, Apex sent a follow-up email to SKSB regarding its intent to invoke the arbitration clause which was also not replied by SKSB. Apex proceeded

to file its application for stay pending reference to arbitration together with its affidavit-in-support ('stay application/encl.7') pursuant to s. 10 of the Arbitration Act 2005 ('AA'). The High Court Judge (HCJ') dismissed the stay application primarily on the grounds that (i) Apex's conduct of seeking two extensions after entering its appearance did not constitute an act of abandonment of right to arbitration; and (ii) the terms of the IESB LA clearly adopted and incorporated all of the terms of the second subcontract without any exception or exclusion of the arbitration clause or the exclusive jurisdiction clause. Thus, the arbitration clause applied against SKSB; and (iii) although the arbitration clause applied, the wordings and the harmonious reading with the exclusive jurisdiction effectively covenanted that reference to arbitration was optional and SKSB could opt to litigate the dispute before the court pursuant to the exclusive jurisdiction clause. Apex filed its partial appeal against the HCJ's dismissal of encl. 7 ('Appeal 1547') specifically against the HCJ's finding that the reference to arbitration under the arbitration clause was optional. SKSB filed its partial appeal ('Appeal 1704') specifically against the HCJ's finding that the two months' extension of time requested by Apex was not an 'act' in furtherance of the court proceedings (or not an abandonment of right to arbitrate the dispute). Hence, these appeals. The issues that arose were whether the HCJ was correct in: (i) finding that the arbitration clause and exclusive jurisdiction clause within the second subcontract were enforceable against SKSB in view of the express incorporation and adoption of the second subcontract within the IESB LA; (ii) in its reading and interpretation of both the arbitration clause and the exclusive jurisdiction clause and concluding that the reference to arbitration was only optional (not mandatory); and (iii) in finding that Apex's requests for extensions of time did not effectively denote that Apex had abandoned its right to refer the dispute to arbitration.

**Held (allowing Appeal 1547; dismissing Appeal 1704):**

**(1a)** Both the plaintiff and defendant were attempting to preserve the subsistence and enforceability of the second subcontract. In actuality, SKSB's adoption of all the terms and conditions of the second subcontract (which was originally covenanted by SVSB) was squarely akin to a contractual assignment. This was clear from a plain reading of IESB's letter requesting Apex for all payments in the due performance of the second subcontract be paid directly to SKSB. IESB did not refer to any other contract aside from the second subcontract it had previously entered with Apex. It was clear here that the parties had intended that SKSB were to execute or perform the works under the second subcontract and be paid pursuant to the same second subcontract. Apex *via* its letter to SKSB/plaintiff had explicitly referred to the involvement of SKSB under a 'direct assignment' pertaining to the works enumerated under the second subcontract.

Thus, considering the documentary evidence above, it was certainly more probable than not that the entirety of the terms and conditions of the second subcontract had been assigned from SVSB to SKSB *via* a contractual assignment (not novation). (paras 11 & 12)

**(1b)** An arbitration clause conceptually is a separate and distinct agreement than that of the substance of the main agreement. However, this conceptual separation does not at all 'segregate' the arbitration clause from being a clause within the main agreement (and neither did Apex furnish any precedents supporting such notion). The conceptual separation of an arbitration clause exists and arises in relevant circumstances such as the distinction between the *lex arbitri* (the law of arbitration) and the *lex contractus* (the law of the contract). In this instance, indeed the arbitration clause can be separate than that of the main agreement. But this conceptual separation does not by any means remove or isolate the arbitration clause from becoming 'a term' within the main agreement. It did not render the arbitration clause to be a proverbial 'plus one' to the main agreement. The arbitration clause was still within the same singular unit as the main agreement. (paras 14 & 15)

**(1c)** Despite the conceptual separation, it has never been the law that the assignment of all of a contract's terms would require express inclusion (or exclusion) of the arbitration agreement. The operative words 'all terms' of the second subcontract would literally include the arbitration clause. To now ask the court to exclude the arbitration clause (where there was never any express exclusion) would mean to ask the court to unjustly rewrite the terms of the IESB LA to the extent of reading words which were never within the IESB LA in the first place. In any case, the HCJ was apt in identifying that SKSB's pleadings necessarily ought to estop SKSB from negating the fact that the scope of the appointment of SKSB as the third layer subcontractor went beyond the mere scope of works and include all rights and obligations of IESB enumerated within the second subcontract. It would be gravely unjust to allow SKSB in one breath to fiercely plead on undertaking all of IESB's rights under the second subcontract and on the same singular breath also strenuously isolate itself from the terms of the second subcontract. Thus, estoppel should necessarily bar SKSB from denying the applicability and relevance of the arbitration clause against SKSB. The HCJ was correct in finding that the arbitration clause and exclusive jurisdiction clause within the second subcontract were enforceable against SKSB in view of the express incorporation and adoption of the second subcontract within the IESB LA. (paras 21-24)

**(2a)** The HCJ undertook a simplistic and rigid literal interpretation of the operative word 'may' to denote that the parties have mutually agreed that a refence to arbitration (as a dispute resolution mechanism) was optional and not mandatory. On the contrary, such literal appreciation of the operative word 'may' would be ignorant of the true context of the arbitration clause as a whole. The 'option' left in the liberty of SKSB (as subcontractor) was to either accede to the officer's decision or if SKSB remained dissatisfied, SKSB must mandatorily refer the dispute to arbitration. Thus, the two options available were not a choice between arbitration or litigation, but instead between accedence and arbitration. The descriptor and heading of cl. 38 are 'arbitration' and not generally 'dispute resolution'. It would defeat the entire purpose of the clear and restrictive tenor of the arbitration clause if the arbitration clause allowed for other modes of dispute resolution other than arbitration. Had that been the parties' intention, then the parties ought to have titled the heading of the clause as a general and open-ended 'dispute resolution' and not restricting and limiting the scope of dispute resolution solely to 'arbitration'. To interpret otherwise would be unnecessarily 'adding' an option that was expressly omitted from the arbitration clause and would unnecessarily take the teeth out of the bite of the arbitration clause. The word 'may' in cl. 38.3 could not be read in a *silo* without properly appreciating the surrounding clauses which effectively present and prescribe the actual options that were made available to SKSB. In the entire length of cl. 38, there has been absolutely no mention of any other mode of dispute resolution other than arbitration. In fact, the only mode of dispute resolution explicitly mentioned for further dissatisfaction beyond the appointed officer's decision, was arbitration. (paras 21-34)

**(2b)** SKSB's contention that Apex 'could not' invoke the arbitration clause was sorely misconceived. Since the arbitration clause imposed mandatory reference to arbitration against SKSB, then it was well within Apex's contractual rights to ensure that SKSB did not derail away from its mutual agreement to mandatorily refer the dispute to arbitration. Just because Apex was not clothed with the discretion to insist on arbitration did not at all exonerate SKSB from stashing away from its contractual obligation to mandatorily refer to arbitration. (para 43)

**(2c)** SKSB argued that the co-existence of the exclusive jurisdiction clause (where parties agreed to submit to the jurisdiction of the Malaysian court) must necessarily lead to the interpretation that 'may' carries a directory (optional) meaning in that if SKSB as subcontractor does not intend to arbitrate the dispute under cl. 38 (the arbitration clause), then SKSB may opt for litigating the dispute under cl. 39 of the same second subcontract. However, this argument would lead to the

over-stretching of the true context and utility of the exclusive jurisdiction clause to prescribe the *lex contractus* (the law of contract) of the second subcontract. Clause 39 is a typical feature of an agreement which contained an arbitration clause where the *lex arbitri* and the *lex contractus* may differ from one another. In fact, cl. 39's heading and description had nothing to do whatsoever with a dispute resolution mechanism. The primary intent and purpose of the exclusive jurisdiction clause was to prescribe the *lex contractus* and nothing beyond that. (paras 45-47)

**(2d)** In the instance of arbitration, there exists statutorily codified rights and safeguards in which parties in an arbitration may invoke or seek from the court prior, during and even after an arbitration reading. With all these statutory rights and safeguards in place, it was vivid that SKSB's twisted interpretation of both the arbitration clause and the exclusive jurisdiction clause was thoroughly misconceived. The mere fact that cl. 39 stipulated that the subcontractor submitted itself to the jurisdiction of the Malaysian court for all actions or proceedings arising from the second subcontract did not at all denote an option to litigate before the court. It just simply meant that for all the statutory remedies that SKSB can pursue before the court under the AA, SKSB must necessarily seek those remedies in an action before the Malaysian High Court and not any other court of another jurisdiction. There was neither any dissonance nor contradiction between the arbitration clause and the exclusive jurisdiction clause. This court was inclined to accept the harmonious interpretation that leaned towards upholding a mutually agreed arbitration agreement. The HCJ had indeed erred in his reading and interpretation of both the arbitration clause and exclusive jurisdiction clause and concluding that the reference to arbitration was only optional (not mandatory). Thus, as reference to arbitration was mandatory under the proper interpretation of the arbitration clause, encl. 7 was allowed. Accordingly, the SKSB's suit before the High Court was stayed pending the reference of the dispute to arbitration. (paras 48, 50, 52, 53 & 67)

**(3)** Considering the multimillion amount supposedly dealt with in the dispute, it was definitely within reason that parties would require much time to carefully comb through voluminous documents to best ascertain the appropriate course of action. This certainly rang true especially considering that SKSB not only did not object against Apex's request for extension of time, but proceeded to support the same on the same exact ground. Thus, Apex's conduct of requesting for extension of time to prepare a defence fell within the confines of s. 10(c) of the AA in which the court must consider based on the facts of each respective case on whether or not such act indicated an

unequivocal abandonment of right to arbitration. The HCJ was correct to find that Apex's requests for extensions of time did not effectively denote that Apex had abandoned its right to refer the dispute to arbitration. (paras 58-65)

**Case(s) referred to:**

*Airbus Helicopters Malaysia Sdn Bhd v. Aerial Power Lines Sdn Bhd [2024] 4 CLJ 243 CA* ***(refd)***

*Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd [2013] 7 CLJ 18 FC* ***(refd)***

*Albilt Resources Sdn Bhd v. Casaria Construction Sdn Bhd [2010] 7 CLJ 785 CA* ***(refd)***

*Best Re (L) Ltd v. Ace Jerneh Insurance Bhd [2015] CLJU 959; [2015] 1 LNS 959 CA* ***(refd)***

*Bonnot v. Congress of Independent Unions Local 331 F.2d 355 (1964)* ***(refd)***

*Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC* ***(refd)***

*Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals [2012] 2 CLJ 16 CA* ***(refd)***

*CMS Energy Sdn Bhd v. Poscon Corporation [2008] CLJU 543; [2008] 1 LNS 543 HC* ***(refd)***

*Davanam Constructions Sdn Bhd v. THP Enstek Development Sdn Bhd [2024] CLJU 1204 HC* ***(refd)***

*Hamidah Fazilah Sdn Bhd v Universiti Tun Hussein Onn Malaysia (UTHM) [2016] CLJU 1170; [2016] 1 LNS 1170 HC* ***(refd)***

*Ho Yau Hong & Ors v. How Yaw Ming And Another Appeal [2023] CLJU 827; [2023] 1 LNS 827 CA* ***(refd)***

*IFCI Ltd v. Archipelago Insurance Ltd [2022] 2 CLJ 535 CA* ***(refd)***

*International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd & Anor [2014] 1 SLR 130* ***(refd)***

*Khatijah Abdullah & Ors v. Mohd Isa Biran [2017] 7 CLJ 513 FC* ***(refd)***

*Kuan Kong Hong v. Ng Kim Cheong & Anor [2023] CLJU 1541; [2023] 1 LNS 1541 CA* ***(refd)***

*LYL Hooker Sdn Bhd v. Tevanaigam Savisthri KT Chitty & Anor [1987] 1 CLJ 356; [1987] CLJ (Rep) 179 SC* ***(refd)***

*Malaysian Newsprint Industries Sdn Bhd v. Bechtel International Inc & Anor [2008] CLJU 222; [2008] 1 LNS 222 HC* ***(refd)***

*Maya Maju (M) Sdn Bhd v. Putrajaya Homes Sdn Bhd [2018] CLJU 1245; [2018] 1 LNS 1245 HC* ***(refd)***

*Mun Seng Fook v. AIG Malaysia Insurance Bhd [2018] 8 CLJ 394 HC* ***(refd)***

*Pipeline Services WA Pty Ltd v. Auto Gas Australia Pty Ltd [2014] WA SC 10* ***(refd)***

*Prenn v. Simmonds [1971] 3 All ER 237* ***(refd)***

*Sangka Chuka & Anor v. Pentadbir Tanah Daerah Mersing, Johor & Ors [2016] 4 CLJ 585 HC* ***(refd)***

*Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor [2002] 3 CLJ 213 FC* ***(refd)***

*The Annefield [1971] 1 All ER 394* ***(refd)***

*The Varenna [1983] 3 All ER 645* ***(refd)***

*Thomas & Co Ltd v. Portsea Steamship Co Ltd [1912] AC 1* ***(refd)***

*TNB Fuel Services Sdn Bhd v. China National Coal Group Corp [2013] CLJU 288; [2013] 1 LNS 288 CA* ***(refd)***

*Vila Mekar Sdn Bhd v. Wong Yie Dee [2025] CLJU 1703 CA* ***(refd)***

**Legislation referred to:**
Arbitration Act 2005, ss. 9(5), 10, 11, 37, 38
Contracts Act 1950, s. 63
National Land Code, s. 418

*For the plaintiff - Edmund Bon Tai Soon, Khor Xiou Shan & Lee Yee Woei; M/s AmerBON*
*For the defendant - Dato' Stanley Isaacs, R Vasanthi, John Isaacs & Shanthiny Ya Ting; M/s Isaacs & Tan*

*[Editor's note: For the High Court judgment, please see Sumber Khazanah Sdn Bhd (In Liquidation) v. Apex Communications Sdn Bhd [2023] CLJU 2023; [2023] 1 LNS 2023 (overruled in part).]*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

### Azimah Omar JCA:

### Introduction

**[1]** The two appeals before us primarily concern preliminary issues as to the applicability and the proper interpretation of an arbitration clause as well as an exclusive jurisdiction clause as against a third layer subcontractor who was assigned the rights and terms of a subcontract agreement which was entered into by the first and second layers subcontractors.

**[2]** In essence, the third and final layer subcontractor was the contractor who eventually performed the work package for the project and are now claiming for unpaid work allegedly done against the first layer subcontractor *via* court litigation.

**[3]** The substance and merit of the claim was not yet determined by the High Court below. Instead, the parties are now before us in view of the learned High Court Judge's ("learned judge") dismissal of the first layer subcontractor's stay application to refer the dispute to arbitration under s. 10 of the Arbitration Act 2005.

**[4]** Despite there were two appeals filed by the respective parties, the two appeals impugn the sole and singular decision to dismiss the stay application (*albeit* against different portions and points of the same decision).

**[5]** In any case, it is only apt for us to first appreciate and lay down the factual matrix that had culminated the appeals before us. Considering the parties are both appellants and respondents in their respective two appeals, it is only practical to refer to their original capacities before the High Court below.

A **Factual Background**

**[6]** For a swift and easy appreciation of the underlying facts we have prepared Table A below:

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| TABLE A | |
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| **DATE** | **EVENT** |
| 16.10.2012 | UEM Construction Sdn Bhd appointed Apex Communications Sdn Bhd **("Apex / Defendant")** as 1st Layer Subcontractor to execute and complete a project known as **Package S8:** Construction and Completion of Elevated Stations and other Associated Works at Saujana Impian, Bandar Kajang and Kajang **("S8 Package")** via a contract dated 16.10.2012 **("1st Subcontract").** |
| **8.2.2013** | Apex appointed Ikatan Engineering Sdn Bhd **("IESB")** as the 2nd Layer Subcontractor to execute and complete the S8 Package **("2nd Subcontract")**. The Arbitration Clause **(clause 38)** and the Exclusive Jurisdiction Clause **(Clause 39)** were contained within this 2nd Subcontract. |
| **30.9.2013** | IESB appointed Sumbertech Ventures Sdn Bhd **("SVSB")** as the 3rd Layer Subcontractor to execute and complete the S8 Package via a Letter of Appointment **("IESB LA")**. Although later, SVSB's position as 3rd layer Subcontractor was **ASSIGNED to Sumber Khazanah Sdn Bhd ("SKSB / Plaintiff")** at IESB's request. Thus, under the IESB LA, SKSB / Plaintiff covenanted to **strictly follow and comply with ALL TERMS & CONDITIONS of the 2nd Subcontract** (without any express exclusion of the Arbitration Clause or the Exclusive Jurisdiction Clause). |

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| 16.12.2013 | In furtherance of the assignment of the IESB LA from SVSB to SKSB / Plaintiff, IESB via a letter dated 16.12.2013 had requested Apex (as 1st Layer Subcontractor) to make all payments directly to SKSB. |
| 5.3.2014 | Apex via a letter dated 5.3.2014 approved and acknowledged the **"direct assignment"** of the S8 Package to SKSB / Plaintiff as well as the direct payment arrangement to SKSB / Plaintiff as requested by IESB. |
| Circa 2016 - 2017 | Disputes began to arise regarding the certification or under – certification of works allegedly performed by the Plaintiff-SKSB. |
| 21.10.2022 | SKSB / Plaintiff commenced its action at the High Court of Kuala Lumpur against Apex for alleged unpaid works to the amount of RM33,314,908.39 and for the release of the Performance Bond to the sum of RM1,824,941.78. |
| 6.11.2022 | Apex entered its Memorandum of Appearance and requested for an extension of time to review documents, prepare a defence, and to obtain instructions. The Court granted the **1st Extension of Time.** |
| 1.12.2022 | Apex applied for a further extension of time to review documents, prepare a defence, and to obtain instructions. The Court granted the **2nd Extension of Time** until 21.12.2022. |

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| 2.12.2022 | Apex's solicitors issued a letter to SKSB's solicitor informing of Apex's intention to invoke Clause 38.1 (c) of the 2nd Subcontract **("Arbitration Clause")** and refer the dispute for Arbitration. **SKSB's solicitors never responded or replied to this letter**. |
| 16.12.2022 | Due to SKSB's solicitor's non-response to Apex's solicitor's letter, Apex sent a follow up email to SKSB's solicitors regarding its intent to invoke the Arbitration Clause **which was also not replied by SKSB's solicitors.** |
| 21.12.2022 | Apex proceeded to file its Application for Stay pending reference to arbitration together with its Affidavit in Support **("Stay Application / Enclosure 7")** pursuant to **Section 10 of the Arbitration Act 2005.** |
| 18.9.2023 | Upon exhaustion of Affidavits and Hearing proper of Enclosure 7, the Learned Judge dismissed the Stay Application with costs of RM5,000.00 primarily on the grounds that:<br><br>i. Apex's conduct of seeking for two (2) extensions (of 2 months total) after entering its Appearance **does not constitute an act of abandonment of right to arbitration**;<br><br>ii. The terms of IESB LA clearly adopted and incorporated ALL of the terms of the 2nd Subcontract without any |

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| | exceptions or exclusion of the Arbitration Clause or the Exclusive Jurisdiction Clause. Thus, the Arbitration Clause applies as against SKSB / Plaintiff; and<br><br>iii. Although the Arbitration Clause applies, the wordings and the harmonious reading with the Exclusive Jurisdiction Clause effectively covenanted that **reference to arbitration was OPTIONAL and SKSB can opt to litigate the dispute before the Court pursuant to the Exclusive Jurisdiction Clause.** |
| 22.9.2023 | Apex filed its Partial Appeal against the Learned Judge's dismissal of its Enclosure 7 **("Appeal 1547")** specifically against the Learned Judge's finding that the reference to arbitration under the Arbitration Clause was optional. |
| 16.10.2023 | SKSB filed its Partial Appeal **("Appeal 1704")** specifically against the Learned Judge's finding that the 2 months' extension of time (delay) requested by Apex / Defendant was not an 'act' in furtherance of the Court proceedings (or not an abandonment of right to arbitrate the dispute). |
| 15.11.2023 | The Learned Judge had allowed Appex's / Defendant's Application for Stay pending the Appeal at the Court of Appeal **("enclosure 24")**. |

## The Appeals Before Us

**[7]** We have perused the memorandums of appeal, the High Court's grounds of judgment, the records of appeal and the parties' respective written submissions and we are of the view that the two appeals before us can be decided by determining the following three issues:

(i) issue 1: Whether the learned judge was correct in finding that the arbitration clause and exclusive jurisdiction clause within the second subcontract were enforceable against SKSB in view of the express incorporation and adoption of the second subcontract within the IESB LA;

(ii) issue 2: Whether the learned judge was correct in its reading and interpretation of both the arbitration clause and the exclusive jurisdiction clause and concluding that the reference to arbitration was only optional (not mandatory); and

(iii) issue 3: Whether the learned judge was correct to find that Apex's requests for extensions of time did NOT effectively denote that Apex had abandoned its right to refer the dispute to arbitration.

*Issue 1: Whether The Learned Judge Was Correct In Finding That The Arbitration Clause And Exclusive Jurisdiction Clause Within The Second Subcontract Were Enforceable Against SKSB In View Of The Express Incorporation And Adoption Of The Second Subcontract Within The IESB LA*

**[8]** At this early juncture, we are minded to set the record straight regarding the peculiar 'switch' or 'replacement' between SVSB and SKSB as the third layer subcontractor. Fact of the matter is the subject second subcontract was a bipartite or bilateral agreement between IESB (second layer subcontractor) and SVSB (not SKSB/plaintiff). It gleaned from the pleadings that somehow both parties were in mutual agreement that the second subcontract effectively appointed SKSB (and not SVSB).

**[9]** We have examined parties' respective submissions and were curious to identify that neither the plaintiff nor the defendant was fully clear as to the manner, method, and history in which SKSB suddenly came into the picture. There appears to be an inexplicable 'gap' between the express appointment of SVSB and the subsequent mutual admission and acknowledgment by both parties that somehow SKSB was the party mutually accepted as the third layer subcontractor (despite the IESB LA expressly naming SVSB). We thus understand the learned judge's predicament and ultimately, error in assuming that SKSB had come into the picture *via* a novation (or novation agreement).

**[10]** Although a novation can have a 'substituting' effect, it does not necessarily account for what had occurred in the appeals before us. This is because (as astutely highlighted by learned counsel for SKSB/plaintiff) the net consequence of a novation is not merely the substitution of parties or the 'assignment' of contractual covenants to another party. Instead, a novation also entails the extinguishment of the old or prior contract and the birth of a new contract. A novation is not merely a 'transfer' of covenants but a total replacement of contract altogether. This is in light of the effect of a novation

prescribed under s. 63 of the Contracts Act 1950 (in that, "the original contract need not be performed"). (See also Supreme Court in *LYL Hooker Sdn Bhd v. Tevanaigam Savisthri KT Chitty & Anor* [1987] 1 CLJ 356; [1987] CLJ (Rep) 179; [1987] 2 MLJ 52).

**[11]** On the extreme contrary, both the plaintiff and defendant here by all means were attempting to preserve the subsistence and enforceability of the second subcontract. In actuality, SKSB's/plaintiff's adoption of all the terms and condition of the second subcontract (which was originally covenanted by SVSB) is squarely akin to a contractual assignment. This is clear firstly from a plain reading of IESB's letter requesting Apex for all payments in the due performance of the second subcontract be paid directly to SKSB/plaintiff. IESB did not refer to any other contract aside from the second subcontract it had previously entered with Apex. It was clear here that the parties had intended that the plaintiff/SKSB were to execute or perform the works under the second subcontract and be paid pursuant the same second subcontract:

IE IKATAN ENGINEERING SDN. BHD. (Company No. 10251-M)

Office & Works :
Lot 51, IGB International Industrial Park,
Jalan Kuala Kangsar, 31200 Ipoh,
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Our Ref. : FD-1017-02
Date : 16th December 2013

**APEX COMMUNICATION SDN BHD**
12TH FLOOR, MENARA HAP SENG
JALAN P. RAMLEE
50520 KUALA LUMPUR
Tel: 03-2148 8810
Fax: 03-2142 4211

Attention : EN. DZULKIFLEE MOHAMAD RAMLI
C.C. : EN. ASMANIZAM BIN ABDULLAH (CONTRACT MANAGER)

RE : **KVMRT PACKAGE SB: CONSTRUCTION AND COMPLETION OF ELEVATED STATIONS AND OTHER ASSOCIATED WORKS AT SAUJANA IMPIAN, BANDAR KAJANG AND KAJANG: STRUCTURAL STEEL WORKS**
- Letter of instruction for payments directly to our sub-contractor Sumber Khazanah Sdn Bhd

Dear En. Dzulkiflee,

Further to our letter reference FD-1017-01 dated 29.11.2013 regarding sub-contracting of Package S8 to Sumber Khazanah Sdn Bhd, we wish to request that, all payments including but not limited to all Variation Order and Retention Sum whatsoever pertaining to the works of this Package S8, to be paid directly from Apex communication Sdn Bhd to our sub-contractor Sumber Khazanah Sdn Bhd.

**[12]** Secondly and most pertinently, Apex *via* its letter to SKSB/plaintiff dated 5 March 2014 had explicitly referred to the involvement of SKSB under a "direct assignment" pertaining to the works enumerated under the second subcontract. Thus, considering the documentary evidence above, it is certainly more probable than not that the entirety of the terms and conditions of the second subcontract had been assigned from SVSB to SKSB *via* a contractual assignment (not novation):

APEX
COMMUNICATIONS SDN BHD
187475-V
Head Office
12th Floor, Menara Hap Seng
Jalan P. Ramlee
50250 Kuala Lumpur, Malaysia
Tel (603-2148 8810
Fax (603-2142 6003
Manufacturing & Operations
• Wisma APEX
No 2A, Lot 290
Jalan 1/9f 3 Off Jalan Seta
Taman Perindustrian UEP
47600 Subang Jaya, Malaysia
Tel (603-8024 2208, 8024 2001
Fax (603-8024 1916, 8024 2314

Our Ref.: ACDC/SC/S8/C/SK/0314(1)(paymentassignment)

5th March 2014

SUMBER KHAZANAH SDN BHD
Lot 30938, Jalan KPB 6, Kawasan Perindustrian Bukit Belimbing,
43300 Balakong,
Selangor.

Attn: Mr. Chan Lee Sim/Ooi Thean Seong

Dear Sir,

PROJEK MASS RAPID TRANSIT LEMBAH KLANG: JAJARAN SUNGAI BULOH – KELANG.
PACKAGE S8: CONSTRUCTION AND COMPLETION OF ELEVATED STASTIONS AND OTHER ASSOCIATED WORKS AT SAUJANA IMPAIN, BANDAR KAJANG AND KAJANG.
RE: Direct Payment Assignment

We refer to your letter reference SK/GL/ALC-13/1539 dated 20 January 2014.

We note you and Ikatan Engineering Sdn Bhd have confirmed the agreement for direct assignment pertaining to the works of KVMRT S8: Steel Structural Works, to be paid directly by us to you, in the event that we have no objection.

Thank you.

For and on behalf of
APEX COMMUNICATIONS SDN BHD

MOHD FARID KAMSIR
*Senior General Manager*

**[13]** Considering the above, it is now crystal clear as to the proper manner in which the terms of the IESB LA must be read under the clear understanding and effect that SVSB was substituted with SKSB. With this fact in mind, it is now possible to ascertain the true extent and scope of what SKSB had undertook to adopt in our examination of the IESB LA (now appointing SKSB as the third layer subcontractor).

**[14]** It is indeed trite and well-established that an arbitration clause conceptually is a separate and distinct agreement than that of the substance of the main agreement. However, this conceptual separation does not at all 'segregate' the arbitration clause from being a clause within the main agreement (and neither did Apex furnished any precedents supporting such notion). The conceptual separation of an arbitration clause exists and arises in relevant circumstances such as the distinction between the *lex arbitri* (the law of arbitration) and the *lex contractus* (the law of the contract).

**[15]** It is commonplace that international contracts can apply a different law than that of the law of (or the seat of) arbitration. In this instance, indeed the arbitration clause can be separated than that of the main agreement. But this conceptual separation does not by any means remove or isolate the arbitration clause from becoming 'a term' within the main agreement. It does not render the arbitration clause to be a proverbial 'plus one' to the main agreement. The arbitration clause is still within the same singular unit as the main agreement.

**[16]** SKSB's submission on this point somehow was ignorant of the prevailing statutory rule on constitution of arbitration agreement by way of reference already codified in s. 9(5) of the Arbitration Act 2005. SKSB instead would prefer us to arbitrarily ignore the operation of this provision in preference to old English precedents on specific, exact, and technical maritime contracts in the form of charter-parties and bills of lading (which was sorely distinguishable from the general and simplistic tenor of the language the parties used in their subcontracts and letter of appointment). They were not at all an apple-to-apple comparison to the starkly general and simplistic language of the second subcontract and the IESB LA. It would be gravely unjust for us to impose such magnitude of exactitude and criticality when the parties by and large had not conducted dealings in such degree of exactitude and technicality. On that note we are not persuaded to follow the English decisions of *Thomas & Co Ltd v. Portsea Steamship Co Ltd* [1912] AC 1; *The Annefield* [1971] 1 All ER 394, and *The Varenna* [1983] 3 All ER 645.

**[17]** In fact, the Court of Appeal in *Best Re (L) Ltd v. Ace Jerneh Insurance Bhd* [2015] CLJU 959; [2015] 1 LNS 959; [2015] 5 MLJ 513 had expressly held that the English Court's 'restrictive approach' is primarily unique to bills of lading and charter-parties:

> From these developments in this particular area of the law **it is possible and can be argued that the English strict approach is peculiar and unique to bill of lading cases and charter parties**, and also to cases where the first contract or agreement which contained the arbitration clause or agreement is not readily available to the party who enters into the second contract.
>
> (emphasis added)

(See also *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd & Anor* [2014] 1 SLR 130).

**[18]** Furthermore, the Court of Appeal in *Best Re (L) Ltd v. Ace Jerneh Insurance Bhd* [2015] CLJU 959; [2015] 1 LNS 959; [2015] 5 MLJ 513 had astutely appreciated that more and more jurisdictions (especially our close commonwealth neighbours in Hong Kong and Singapore) had refreshingly departed from the 'restrictive approach' of the English courts regarding the incorporation of arbitration clauses by way of reference.

**[19]** We are certainly in celebration of this refreshing departure as such stringent approach would be too rigid and blind to the reality of the dynamicity of language, intent, and autonomy *ad infinitum* in which contractual parties may so choose to govern their covenants. Especially in the appeals before us, the form and language in which the parties have employed in the series of appointments and subcontracts by and large had been brief and general:

> *Be that as it may, current global developments in most common law jurisdiction (except for England) have shown a healthy and refreshing trend* that may further boost the application of arbitration as a preferred choice of an alternative dispute resolution particularly amongst the commercial community. Hong Kong, for example, is also a common law jurisdiction and also a model law compliant State. But, *judicial pronouncements by Hong Kong courts in recent decisions on this issue show a departure from the strict English approach*. In *Astel-Peiniger Joint Venture v. Argos Engineering & Heavy Industries Co Ltd* [1994] 3 HKC 328, the Hong Kong High Court – Court of first instance in construing article 7(2) of the UNCITRAL Model Law said that the proposition laid down in the House of Lord case of *Thomas v. Portsea* that the arbitration clause must be specifically referred to before it can be satisfactorily incorporated has no application in Hong Kong. The court went on to say that in determining whether or not there has been incorporation by reference is one of construction namely to ascertain the parties' intentions when they entered into the contract by reference to the words used by the parties. This decision was affirmed by the Hong Kong High Court in another case namely *Gay Construction Pty Ltd & Anor v. Caledonian Techmore (Building) Ltd (Hanison Construction Co Ltd, Third Party)* [1994] 2 HKC 562.

> Similarly, in *Singapore* the courts have *taken a robust approach in departing from applying the strict English approach*. In *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd & Anor* [2014] 1 SLR 130, the Singapore Court of appeal adopted the approach in the Hong Kong cases of *Astel-Peiniger Joint Venture and Gay Construction Pty Ltd & Anor* and refused to follow the English position. Sundaresh Menon CJ who delivered the judgment in that case put aside the English authorities and *said that 'the strict rule has been overextended impermissibly from its original application in the context of bill of lading and charter parties'*.
>
> (emphasis added)

**[20]** In any case, we resoundingly echo and we are also bound by the apex decision of the Federal Court in *Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd* [2013] 7 CLJ 18; [2013] 5 MLJ 625 in which the Federal Court had outright held that the operation of s. 9(5) of the Arbitration Act 2005 is significantly wide so as to allow the incorporation of an arbitration clause (into another contract by way of general reference) without the strict requirement of specific reference or explicit mention of the arbitration clause:

> [26] *Section 9(5) of the Act therefore clarifies that the applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration made 'by reference'*. Section 9(5) of the Act in our view addresses the situation where the parties, instead of including an arbitration clause in their agreement, *include a reference to a document containing an arbitration agreement or clause*. It also confirms that an arbitration agreement may be formed in that manner provided, firstly, that the agreement in which the reference is found meets the writing requirement and secondly, that the reference is such as to make that clause part of the agreement. The document referred to need not to be signed by the parties to the contract (see the case of *Astel-Peiniger Joint Venture v. Amos Engineering & Heavy Industries Co Ltd* [1994] 3 HKC 328). *We are of the view that the mere fact the arbitration clause is not referred to in the contract and that there is a mere reference to standard conditions which was neither accepted nor signed, is not sufficient to exclude the existence of the valid arbitration clause. There is no requirement that the arbitration agreement contained in the document must be explicitly referred to in the reference. The reference need only be to the document and no explicit reference to the arbitration clause contained therein is required*.
>
> (emphasis added)

(See also Court of Appeal in *Albilt Resources Sdn Bhd v. Casaria Construction Sdn Bhd* [2010] 7 CLJ 785; [2010] 3 MLJ 656).

**[21]** Despite the conceptual separation, it has never been the law that the assignment of all of a contract's terms would require express inclusion (or exclusion) of the arbitration agreement. The operative words "all terms" of the second subcontract would literally include the arbitration clause. To now ask the court to exclude the arbitration clause (where there was never

any express exclusion) would mean to ask the court to unjustly rewrite the terms of the IESB LA to the extent of reading words which were never within the IESB LA in the first place.

**[22]** In any case, the learned judge was apt in identifying that SKSB's pleadings necessarily ought to estop SKSB from negating the fact that the scope of the appointment of SKSB as the third layer subcontractor goes beyond the mere scope of works and includes all rights and obligations of IESB enumerated within the second subcontract:

> [38] From the chronology of facts and the documents in exhibit CLS2 of enclosure 9, it appears that the Plaintiff had taken over the rights, obligations and responsibilities of IESB in the Package S8 Sub Contract. My said finding would also appear to be supported by the Plaintiffs Statement of Claim where it is stated:
>
> > Berikutan daripada Surat Award tersebut dan Persetujuan Pembayaran Terus tersebut, Plaintif telah mengambil alih sepenuhnya tanggungjawab, kewajipan dan hak IESB di bawah Sub-Kontrak Pakej S8 tersebut. Defendan turut bertindak menurut Persetujuan Pembayaran Terus tersebut dengan menilai dan mengesahkan ("assess and certify") tuntutan-tuntutan kemajuan yang dikemukakan oleh Plaintif dan seterusnya membuat bayaran kepada Plaintif menurut peruntukan-peruntukan Sub-Kontrak Pakej S8 tersebut.
> >
> > ...
> >
> > (b) Memandangkan Plaintif telah mengambil alih sepenuhnya tanggungjawab, kewajipan dan hak IESB di bawah Sub-Kontrak Pakej S8 tersebut berikutan daripada Surat Award tersebut dan Persetujuan Pembayaran Terus tersebut, kesemua kerja-kerja di bawah Sub-Kontrak Pakej S8 tersebut telah dilaksanakan dan disempurnakan oleh Plaintif.

**[23]** It would be gravely unjust to allow SKSB in one breath to fiercely plead on undertaking all of IESB's rights under the second subcontract and on the same singular breath also strenuously isolate itself from the terms of the second subcontract. Thus, estoppel should necessarily bar SKSB from denying the applicability and relevance of the arbitration clause against SKSB. (See *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331; *Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 2 CLJ 16; *Vila Mekar Sdn Bhd v. Wong Yie Dee* [2025] CLJU 1703; [2025] MLJU 2104; *Ho Yau Hong & Ors v. How Yaw Ming & Another Appeal* [2023] CLJU 827; [2023] 1 LNS 827; [2023] MLJU 933).

**[24]** The above considered under this heading, we accordingly answer issue 1 in the positive. The learned judge was certainly correct in finding that the arbitration clause and exclusive jurisdiction clause within the second subcontract were enforceable against SKSB in view of the express incorporation and adoption of the second subcontract within the IESB LA.

*Issue 2: Whether The Learned Judge Was Correct In Its Reading And Interpretation Of Both The Arbitration Clause And The Exclusive Jurisdiction Clause And Concluding That The Reference To Arbitration Was Only Optional (Not Mandatory)*

**[25]** The tenuously debated arbitration clause and exclusive jurisdiction clause within the second subcontract read as follows:

> 38. ARBITRATION
>
> 38.1 *If any dispute or difference shall arise between APEX and the Sub-Contractor*, either during the progress or after completion of the S8 Works Package – Structural Steel Works, or after the determination of the Sub-Contractor's employment or breach of this Agreement, as to:
>
> (a) the construction of this Agreement;
>
> (b) any matter or thing of whatsoever nature arising under this;
>
> (c) the withholding by the P.D. of any certificate to which the Sub-Contractor may claim to be entitled,
>
> *then such dispute or difference shall be referred to the officer named in-Appendix 1 for a decision.*
>
> 38.2 The decision of the officer named in Appendix 1 which is to be in writing shall subject to sub-clause 38.5 hereof be binding on the parties until after the completion of the S8 Works Package Structural Steel Works and shall forthwith be given effect by the Sub-Contractor who shall proceed with the S8 Works Package-Structural Steel Works with all due diligence whether or not notice of dissatisfaction is given by him.
>
> 38.3 If the officer named in Appendix 1 fails to give a decision for a period of forty-five (45) days after being requested to do so by the Sub-Contractor *or if the Sub-Contractor be dissatisfied with any decision of the officer named in Appendix 1, then in any such case the Sub-Contractor may* within forty-five (45) days after the expiration of the forty-five (45) days after he had made his request to the officer named in Appendix 1 or forty-five (45) days after receiving the decision of the officer named in Appendix 1, as the case may be, *require that such dispute or difference be referred to a single Arbitrator* agreed for that purpose, or in default of agreement appointed by the Director of the Regional Centre for Arbitration Kuala Lumpur.
>
> LAW GOVERNING THIS AGREEMENT
>
> 39.1 This Agreement shall be deemed to be a Malaysian Contract and shall accordingly be construed according to the laws for the time being in force in Malaysia and the *Malaysian Courts shall have exclusive jurisdiction to*

A *hear and determine all actions and proceedings arising out of this Agreement and the sub contractor hereby submits to the jurisdiction of the Malaysian Courts for the purposes of any such actions and proceedings.*

(emphasis added)

**[26]** The parties' dissonance as to the interpretation of the two clauses are B essentially the subsequent 'step' after a dispute had been referred to and decided by the appointed officer (primarily if any party or both parties are dissatisfied with the decision of the appointed officer). For clarity, in the instance of dissatisfaction, the relevant portion of the arbitration clause are as follows:

C ... or if the **SUB-CONTRACTOR be dissatisfied** with any decision of the officer named in Appendix 1, then in any such case the **Sub-Contractor MAY … require that such dispute or difference be referred to a single Arbitrator** agreed for that purpose, or in default of agreement appointed by the Director of the Regional Centre for Arbitration Kuala Lumpur.

(emphasis added)

D

**[27]** The learned judge undertook a simplistic and rigid literal interpretation of the operative word "may" to denote that the parties have mutually agreed that a reference to arbitration (as a dispute resolution mechanism) is optional and not mandatory. And thus, parties are at liberty E to opt either for arbitration or litigation *vide* the court.

**[28]** On the contrary, Apex argued (and we are inclined to agree) that the literal appreciation of the operative word "may" would be ignorant of the true context of the arbitration clause as a whole. Apex contended that the 'option' left in the liberty of SKSB (as subcontractor) is to either accede to F the officer's decision or if SKSB remains dissatisfied, SKSB must mandatorily refer the dispute to arbitration. Thus, the two options available were not a choice between arbitration or litigation, but instead between accedence and arbitration.

**[29]** Learned counsel for Apex had primarily relied upon the decision of G Lee Swee Seng J (now FCJ) in the case of *Maya Maju (M) Sdn Bhd v. Putrajaya Homes Sdn Bhd* [2018] CLJU 1245; [2018] 1 LNS 1245; [2018] MLJU 1629. In *Maya Maju*, His Lordship was put to the similar task to break the interpretative stalemate between two differing interpretations over a largely similar arbitration clause to the arbitration clause in the appeals H before us. The arbitration clause in *Maya Maju* was codified in condition 63 of a condition of contract read alongside a PWD 203 contract. This is largely similar to the instance before us where the subject arbitration clause is contained within the second subcontract and the arbitration clause is incorporated into the IESB LA. Condition 63 also stipulated that should the I contractor be dissatisfied with the decision of the employer's representative ("ER") (in our appeals, the appointed officer), the contractor may refer the matter to arbitration:

> If the ER fails to give a decision for a period of 45 days after being requested to do so by the contractor or **if the contractor be dissatisfied with any decision of the E.R., then in any such case the CONTRACTOR MAY** within 45 days after the expiration of 45 days after he had made his request to the ER, or within 45 days after receiving the decision of the ER, as the case may be, **require that such dispute or difference be referred to arbitration** and final decision of a person to be agreed between the parties to act as the Arbitrator. The arbitration shall be held at the Regional Centre for Arbitration at Kuala Lumpur, using the facilities and assistance available at the Centre. (emphasis added)

**[30]** Closely similar to the appeals before us, condition 63 in *Maya Maju* shared the same two prominent operative features in that:

(i) the sole authority conferred with the authority to refer the dispute to arbitration (if dissatisfied with the decision of the ER (appointed officer in the appeals before us)) is the contractor (subcontractor in the appeals before us); and

(ii) the operative word to govern the contractor's authority to refer to arbitration was "MAY".

**[31]** Astutely (and we are thoroughly in agreement), Lee Swee Seng J (now FCJ) had aptly appreciated that the use of the 'permissive' word "may" in condition 63 ought not to be taken simplistically from its literal permissive (or optional) meaning. Thus, His Lordship first remarked that a 'directory' interpretation of the permissive word "may" here would squarely contradict the true 'mandatory' context and spirit of the arbitration clause:

> [56] It is important at this stage to ask what does the auxiliary verb "may" qualify. *Here it qualifies the options of either not proceeding further after the ER's decision or no decision from him or to proceed further.* If the Plaintiff Contractor chooses to proceed further he has contractually committed himself to arbitration for *there is no indication that he may refer the dispute to litigation.*
>
> [57] Indeed *the whole of the Condition is entitled "Arbitration". It Is Not A Contrast Between 2 Options ie, Arbitration Or Litigation. It is a contrast between requiring reference to arbitration or not to require such a reference.*
>
> ...
>
> [63] Learned counsel for the Defendant submitted with considerable persuasion that *it would be futile and indeed against sound commercial sense and it would Militate Against Common Sense To Execute An Arbitration Agreement Which Is Non-binding*, particularly so when the Clause 63 is so comprehensive.
>
> [64] *I agree with the Defendant that in the current context of Condition 63, it could be said that the Plaintiff was given an 'option' to either refer the dispute to arbitration or an 'option' to drop the matter. In any event, the Plaintiff was not at liberty to litigate the matter in court.*
>
> (emphasis added)

**[32]** Similar to the appeals before us, the descriptor and heading of cl. 38 is "arbitration" and not generally "dispute resolution". It would defeat the entire purpose of the clear and restrictive tenor of the arbitration clause if the arbitration clause allows for other modes of dispute resolution other than arbitration. Had that been the parties' intention, then the parties ought to have titled the heading of the clause as a general and open-ended "dispute resolution" and not restricting and limiting the scope of dispute resolution solely to "arbitration". To interpret otherwise would be unnecessarily 'adding' an option that was expressly omitted from the arbitration clause and would unnecessarily take the teeth out of the bite of the arbitration clause. The same way the Legislature would not legislate in vain, parties to a contract would also not covenant in vain or against business common sense.

**[33]** It is trite law that no one clause ought to be read in a *silo* and a contract must be read as a whole. Thus, it is pertinent to accurately appreciate the flow of which the terms of the second subcontract gradually prescribe the rights of the parties. If one were to appropriately read the preceding cl. 38.2 with the debated cl. 38.3, it ought to be exceedingly clear the 'options' that were made available to SKSB as the third layer subcontractor are as follows:

(i) first option: to accede and accept the decision of the appointed officer as binding:

The preceding cl. 38.2 prescribes the binding and final effect of the decision of the appointed officer. Here, SKSB as subcontractor is presented with the first option – that is to accede and accept the decision meted out by the appointed officer; or

(ii) second option: if dissatisfied, refer the dispute to arbitration:

The proceeding cl. 38.3 expressly and explicitly prescribed the singular and sole mode or avenue of further disputation by way of arbitration (if in case SKSB was dissatisfied with the decision of the appointed officer).

**[34]** Thus, the word "may" in cl. 38.3 cannot be read in a *silo* without properly appreciating the surrounding clauses which effectively present and prescribe the actual options that are made available to SKSB. In the entire length of cl. 38, there has been absolutely no mention of any other mode of dispute resolution other than arbitration. In fact, the only mode of dispute resolution explicitly mentioned for further dissatisfaction beyond the appointed officer's decision, was arbitration.

**[35]** His Lordship (Lee Swee Seng now FCJ) further explained that the hypothetical use of the word 'shall' to denominate a mandatory meaning (in the arbitration clause) would lead to absurdity as it would inadvertently 'force or compel' the contractor to refer the matter to arbitration if the contractor was dissatisfied with the ER's decision. And this is certainly

logical and vividly identifiable. If the arbitration clause in the appeals before us was to hypothetically read, 'if the subcontractor was dissatisfied with the officer's decision, the subcontractor shall refer to the matter to arbitration' then the subcontractor would be compelled (even if the subcontractor does not intend to) to refer the matter to arbitration. This is certainly absurd as no party should be compelled to commence any dispute resolution mechanism against a party's will:

> [58] **To compel him to refer the dispute to arbitration with the use of the word "shall" rather than "may" for example, would constrain him to proceed further** after either the E.R. has made a decision or after he has not made a decision within the time frame. As stated the Contractor may want to proceed no further because he could live with the decision for the time being.
>
> (emphasis added)

**[36]** The law should not rob parties off its right to decide how best to deal and manage their affairs. There may be instances where parties would identify that it is more beneficial for them to just let sleeping dogs lie and move on from the dispute in pursuit other business opportunities elsewhere. There might be instances where parties might identify that it is not ideal to foot the bill of an expensive arbitration and just write off the debt it believed to be owed by the other party. It would squarely transgress the business common sense rule of interpretation if parties would be denied all this typical and common business liberties and was 'forced' to further muddy the waters that the parties themselves have identified to be not worth it to (or be disinclined to) expend or expand on. (See *Prenn v. Simmonds* [1971] 3 All ER 237; *Kuan Kong Hong v. Ng Kim Cheong & Anor* [2023] CLJU 1541; [2023] 1 LNS 1541; [2023] 5 MLJ 644; *Davanam Constructions Sdn Bhd v. THP Enstek Development Sdn Bhd* [2024] CLJU 1204; [2024] MLJU 1280 where the courts in recent times have preferred a business common sense rule of interpretation even in cases where there were no ambiguities in a written clause of a contract).

**[37]** His Lordship (Lee Swee Seng now FCJ) further expanded on an example in which the operative word "may" can carry both a directory (optional) and a mandatory meaning. His Lordship used s. 418 of the National Land Code ("NLC") in respect of an aggrieved party's 'directory' option to appeal, as well as 'mandatory' compliance with an appeals procedure if the aggrieved the party so chooses to appeal against the decision of a Land Administrator:

> [60] By way of example one can refer to section 418 of the National Land Code 1965 which reads:
>
> (1) Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any Land Administrator *MAY, at any time within the period of three months beginning with the date on which it was communicated to him, APPEAL therefrom to the Court*.

A ...

> [61] Surely *it is not mandatory for the aggrieved person to appeal to the Court* for the decision of the Registrar for instance *but if he elects to, he must follow the time frame provided of three months and that time frame is not optional* and shall follow the relevant prisons in relating to civil procedure.
>
> B [62] *I agree with learned counsel for the Defendant that in the event the Plaintiff does not want to resolve the matter in Arbitration, the Plaintiff may choose to let the matter end there and then. It does not in any event, confers a discretionary right for the Plaintiff to either litigate or arbitrate the matter*.
>
> (emphasis added)

C **[38]** In exact similar fashion, the word "may" in s. 418 of the NLC cannot be interpreted in a manner that the avenue of impugning the decision of the Land Administrator can vary from the singularly stated method of an appeal. It still remains that if the party aggrieved intends to impugn the decision it is mandatory (without any other option) for the aggrieved party to proceed D with an appeal and not a judicial review. Thus, the word "may" there similarly does not provide for the option to appeal or the option to file for judicial review. Instead (and squarely similar to the appeals before us), the word "may" prescribes the mandatory procedure of an appeal if an aggrieved party intends to impugn the decision of the Land Administrator. Thus, the E actual options stemming from the word "may" there similarly prescribes:

(i) first option: to accede and accept the decision of the Land Administrator; or

(ii) second option: if dissatisfied or aggrieved, file an appeal against the impugned decision of the Land Administrator.

F **[39]** Thus, alike the effect of the word "may" in the appeals before us, it carries a directory (optional) effect on the decision either to appeal or not appeal and at the same time a mandatory effect on the procedure of appeal to be followed (if the aggrieved party decides to appeal). The same way SKSB is not at liberty to opt for litigation before the court, an aggrieved person G under s. 418 of the NLC was not at liberty to proceed with any other remedies (such as a judicial review) save and except the explicitly prescribed appeals procedure.

**[40]** His Lordship (Lee Swee Seng now FCJ) drew support (and we are H certainly in agreement) from a fellow commonwealth court in *Western Australia (In Pipeline Services WA Pty Ltd v. Atco Gas Australia Pty Ltd* [2014] WASC 10) and also from an American court (in *Bonnot v. Congress of Independent Unions Local* 331 F.2d 355 (1964)):

> In the case of *Pipeline Services WA Pty Ltd v. Atco Gas Australia Pty Ltd* I [2014] WASC 10 at [65]-[67] Martin CJ held that:
>
> > [65] Finally Pipeline contends that cl. 25.4 is uncertain because it provides that *a party "may" refer a dispute to arbitration. However, there is no uncertainty arising from the fact that the parties have agreed that they*

*should be given the option to withdraw their claim from the dispute resolution procedure should they wish to do so*. So, in *ABB Power Plants Ltd v. Electricity Cmr of New South Wales (t/as Pacific Power)* (1995) 35 NSWLR 596, the relevant dispute resolution clause provided for determination of disputes by the superintendent appointed under the relevant contract, and further provided that if either party was dissatisfied with that determination that party "may ... give notice in writing to the other party requiring that the matter at issue be referred to arbitration". Handley JA observed:

> *The use of the word "may" in cl. 46.2 is readily explicable because a party dissatisfied with the superintendent's decision, or with the breakdown in the procedure under cl 46.1 may prefer to take the matter no further (599).*
>
> *[66] The same approach may be taken to the proper construction and effect of cl. 25.4. No uncertainty arises from the fact that the parties are given an option to refer a dispute to arbitration*. However, as cl 25.1(b) provides that no party may commence court proceedings without first complying with cl 25, the clause, *on its proper construction, has the effect that if a party decides not to refer the dispute to arbitration it cannot thereafter commence legal proceedings relating to that dispute.*
>
> ...
>
> [66] A similar approach was taken in the United State of America's case of *Bonnot v. Congress of Independent Unions Local* 331 F.2d 355 (1964) where the court held that:
>
> > We should mention, perhaps, the union's suggestion that the bargaining agreement does not compel arbitration but only provides that either party "may" request it; that it is thus permissive and optional; and that neither it nor the contractor elected to arbitrate. The result claimed to follow is that the arbitration here is not mandatory. We think the result is necessarily the other way. *"The obvious purpose of the "may" language is to give an aggrieved party the choice between arbitration or the abandonment of its claim. the presence of this or similar language has not prevented the conclusion that a claim, if pressed, is compulsorily subject to arbitration*".
>
> (emphasis added)

**[41]** During the hearing proper of both appeals before us, learned counsel for SKSB was adamant to distinguish the precedents relied upon by Apex on the supposed ground that the arbitration clauses in the other cases provided for 'both parties' rights to refer to 'arbitration' while the arbitration clause before us only clothes SKSB as subcontractor with the discretion either to accede or to mandatorily refer the dispute to arbitration. We do not hesitate to identify the error and fallacy in this contention firstly on the irrefutable

fact that condition 63 in the case of *Maya Maju* also singularly clothed the contractor with the discretion to either accede or mandatorily refer to arbitration. Thus, SKSB's pursuit of distinguishing the appeals before us on this ground is factually and legalistically erroneous.

**[42]** Secondly, Apex's ground to apply for a stay in encl. 7 here was not grounded on Apex's invocation or insistence on arbitration. It must be remembered that Apex is not the party at odds or dissatisfied with the decision of the appointed officer. Apex is not the party seeking to challenge or impugn the decision of the appointed officer. Thus, at no point in time was Apex seeking to refer to arbitration upon its own volition or 'exercise' of the arbitration clause. Instead, Apex filed encl. 7 to compel SKSB to abide by the mandatory covenant that SKSB must mandatorily refer the dispute to arbitration (in case SKSB seeks to impugn the decision of the appointed officer). So, it must be appropriately understood and appreciated that Apex is not attempting to 'hijack' SKSB's sole discretion to arbitrate the dispute. Apex is merely safeguarding its contractual right to ensure that SKSB abides by the arbitration clause against SKSB to its full and complete effect.

**[43]** SKSB'S contention that Apex 'could not' invoke the arbitration clause is sorely misconceived. Of course, the arbitration clause might not clothe Apex with the contractual say-so to insist on arbitration. Nonetheless, since the arbitration clause imposes mandatory reference to arbitration against SKSB, then it is well within Apex's contractual rights to ensure that SKSB does not derail away from its mutual agreement to mandatorily refer the dispute to arbitration. Just because Apex was not clothed with the discretion to insist on arbitration does not at all exonerate SKSB from stashing away from its contractual obligation to mandatorily refer to arbitration.

**[44]** SKSB also attempted to distinguish the case of *Maya Maju* on the argument that the case of *Maya Maju* did not involve the existence or operability of an exclusive jurisdiction clause (where parties expressly agreed to be subjected to the jurisdiction of the Malaysian court).

**[45]** SKSB argued that the co-existence of the exclusive jurisdiction clause (where parties agreed to submit to the jurisdiction of the Malaysian court) must necessarily lead to the interpretation that "may" carries a directory (optional) meaning in that if SKSB as subcontractor does not intend to arbitrate the dispute under cl. 38 (the arbitration clause), then SKSB may opt for litigating the dispute under cl. 39 of the same second subcontract.

**[46]** However, we are not inclined to follow the argument led by SKSB as this would lead to the over-stretching the true context and utility of the exclusive jurisdiction clause to prescribe the *lex contractus* (the law of contract) of the second subcontract. We agree with learned counsel for Apex that cl. 39 is a typical feature of an agreement which contains an arbitration clause where the *lex arbitri* and the *lex contractus* may differ from one another.

In fact, if one were to literally appreciate cl. 39, cl. 39's heading and description has nothing to do whatsoever with a dispute resolution mechanism. The heading simply and plainly reads:

> Law Governing This Agreement

**[47]** It is plain to see that the primary intent and purpose of the exclusive jurisdiction clause is to prescribe the *lex contractus* and nothing beyond that.

**[48]** We are aware that cl. 39 also refers to "... all actions and proceedings arising out of this agreement ..." and SKSB's staunch reliance on this passage to prove the option to litigate the dispute. Nonetheless, SKSB's contention is sorely ignorant of the fact that even in the instance of arbitration, there exists statutorily codified rights and safeguards in which parties in an arbitration may invoke or seek from the court prior, during, and even after an arbitration hearing. SKSB's contention is ignorant of the fact that there are instances whereby a court proceeding may harmoniously run alongside an ongoing arbitration. And these instances had been codified in s. 11 of the Arbitration Act 2005:

> 11 Arbitration Agreement and Interim Measures by High Court
>
> (1) A party may, **before or during arbitral proceedings, apply to a High Court** for any **interim measure** and the High Court may make the following orders for:
>
> (a) security for costs;
>
> (b) discovery of documents and interrogatories;
>
> (c) giving of evidence by affidavit;
>
> (d) appointment of a receiver;
>
> (e) securing the amount in dispute, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court; [Am. Act A1395: s. 5]
>
> (f) the preservation, interim custody or sale of any property which is the subject-matter of the dispute;
>
> (g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
>
> (h) an interim injunction or any other interim measure.
>
> (emphasis added)

**[49]** In fact, after the issuance of the arbitral award, parties can go to the High Court and apply to set aside the arbitral award on the limited grounds under s. 37 of the Arbitration Act 2005.

**[50]** With all these statutory rights and safeguards in place, it is vivid that SKSB's twisted interpretation of both the arbitration clause and the exclusive jurisdiction clause was thoroughly misconceived. The mere fact that cl. 39

stipulates that the subcontractor submits itself to the jurisdiction of the Malaysian court for all actions or proceedings arising from the second subcontract does not at all denote an option to litigate before the court. It just simply means that for all the statutory remedies that SKSB can pursue before the court under the Arbitration Act 2005, SKSB must necessarily seek those remedies in an action before the Malaysian High Court and not any other court of another jurisdiction.

**[51]** The harmonious reading of an arbitration clause and an exclusive jurisdiction clause (where a party submits itself to the jurisdiction of the court) was also discussed by Lee Swee Seng J (now FCJ) in the reported case of *Hamidah Fazilah Sdn Bhd v Universiti Tun Hussein Onn Malaysia (UTHM)* [2016] CLJU 1170; [2016] 1 LNS 1170; [2017] 7 MLJ 274. *Albeit* that the exclusive jurisdiction clause in *Hamidah* was not exactly similar to cl. 39 before us, the relevant factum remains that in *Hamidah*, an arbitration clause co-existed with an exclusive jurisdiction clause (in the same agreement) where parties agreed on the *lex contractus* and the submission to the court's jurisdiction. His Lordship astutely found that there is no contradiction between the two clauses and that the existence of the exclusive jurisdiction clause does not at all negate the parties' mutual agreement to resolve disputes by way of arbitration:

> [53] I find *no contradiction between* the applicability of the *arbitration clause* in the said contract document in cl 67.0 and the cl 70.0 *in relation to the submission of parties to the jurisdiction of the High Court*.
>
> [54] *As we are all aware, when it comes to certain reliefs in aid of arbitration and more so when it comes to setting aside and enforcement of an arbitral award, the parties seeking such reliefs would still have to come to the relevant court for assistance*. To avoid bickering over what law to apply and which court to apply for such reliefs, parties have addressed this issue at the outset in governing law clause. As both the parties are incorporated in Malaysia and carrying out their business here and as the project is here, it makes every sense for the laws of Malaysia to apply. *Parties have agreed to submit to the exclusive jurisdiction of the courts of Malaysia where there is a need to come to the Malaysian courts to apply for interim measures such as an injunction for instance under s 11 of the Arbitration Act 2005 or for setting aside the award under s 37 or to refer a question of law under s 42 or under s 38 for enforcement of the arbitral award*.
>
> ...
>
> [56] *Where a harmonious interpretation is possible in an apparent contradiction at first reading, that interpretation is to be preferred* lest the baby is thrown out together with the water in the bath tub ... *I cannot read cl 70.0 here as reflecting the intention of the parties to abandon arbitration altogether* after having addressed their mind on the procedure to be followed before a reference to arbitration is made and when arbitration can be commenced as well as the consequences of proceeding with arbitration and the obligations of the parties set out in 11 subclauses in cl 67.0.
>
> (emphasis added)

**[52]** Hence, it is exceedingly plain to see that there was neither any dissonance nor contradiction between the arbitration clause and the exclusive jurisdiction clause in the appeals before us. In any case, we are inclined to accept the harmonious interpretation that leans toward upholding a mutually agreed arbitration agreement (see also *CMS Energy Sdn Bhd v. Poscon Corporation* [2008] CLJU 543; [2008] 1 LNS 543; [2008] 6 MLJ 561; *Malaysian Newsprint Industries Sdn Bhd v. Bechtel International Inc & Anor* [2008] CLJU 222; [2008] 1 LNS 222; [2008] 5 MLJ 254; *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp* [2013] CLJU 288; [2013] 1 LNS 288; [2013] 4 MLJ 857).

**[53]** The above considered under this heading, we accordingly answer issue 2 in the negative. The learned High Court Judge had indeed erred in his reading and interpretation of both the arbitration clause and the exclusive jurisdiction clause and concluding that the reference to arbitration was only optional (not mandatory).

**[54]** It is our finding that it remains mandatory against SKSB to refer the dispute to arbitration if in case SKSB is dissatisfied with the decision of the appointed officer.

**[55]** Let this be a cautionary tale for drafters *in futuro* to be absolutely clear in drafting or agreeing to an arbitration clause. Rather than putting the rights of the party at the mercy of the word "may" or even "shall", prospective contractors or employers ought to spell out in exactitude the avenues or modes of dispute resolution that are included or excluded. Lest parties would have to plough through added and unnecessary difficulties or ambiguities that would further delay a timeous resolution of their disputes (if any).

*Issue 3: Whether The Learned Judge Was Correct To Find That Apex's Requests For Extensions Of Time Did Not Effectively Denote That Apex Had Abandoned Its Right To Refer The Dispute To Arbitration*

**[56]** We have gone at long lengths to appropriately determine the actual substantive portion of the parties' appeals before us primarily on the proper interpretation of the arbitration clause and the exclusive jurisdiction clause.

**[57]** To our summation, each party's submission on this last technical point is brief and miniscule (comparative to the width and breadth of the earlier two issues). Succinctly, SKSB complains that Apex's conduct of seeking two extensions of time (to peruse through voluminous documents in preparation of a defence) tantamount to the abandonment of Apex's rights under the arbitration clause.

**[58]** Considering the multimillion amount supposedly dealt with in the dispute, it is definitely within reason that parties would require much time to carefully comb through voluminous documents to best ascertain the appropriate course of action. This certainly rings true especially considering

that SKSB not only did not object against Apex's request for extension of time, but proceeded to support the same on the same exact ground that there were "voluminous documents that we also had to go through".

**[59]** Beyond the reasonability of the requests, both parties mutually landed on the general rule penned down by the Federal Court in the case of *Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor* [2002] 3 CLJ 213; [2002] 2 MLJ 625 regarding the threshold of conduct of which a party may be deemed to have unequivocally abandon its right for arbitration under s. 10 of the Arbitration Act 2005:

> (a) the entry of appearance is the mandatory procedural step to be taken by an applicant in proceedings in the High Court. It is a step in the proceedings as required by the RHC. However, it is a permitted, excluded or an exempted step in the proceedings that does not amount to a step in the proceedings within the meaning of the s. 6 of the Act which would prejudice the applicant's right to apply for a stay of the proceedings;
>
> (b) *if the applicant has served any pleadings, then he has clearly taken a step in the proceedings within the meaning of s. 6 of the Act*. He has thereby elected to proceed with the proceedings in the High Court and would be barred from applying for a stay of proceedings to refer the dispute to arbitration;
>
> (c) *if he has taken any other action in the proceedings (other than steps (a) or (b) abovementioned), the court will then have to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed off by arbitration*. (emphasis added)

**[60]** Now it is certainly instructive that the Federal Court in *Sanwell* had specifically singled out and isolated the conduct of serving pleadings as a clear step in the proceedings but not the mere preparation of pleadings.

**[61]** Thus, Apex's conduct of requesting for extension of time to prepare a defence falls within the confine of "(c)" in which the court must consider based on the facts of each respective case on whether or not such act indicates an unequivocal abandonment of right to arbitration.

**[62]** That be the case, SKSB proffered the 2019 High Court decision in *Mun Seng Fook v. AIG Malaysia Insurance Bhd* [2018] 8 CLJ 394; [2019] 7 MLJ 59 and the 2022 Court of Appeal decision in *IFCI Ltd v. Archipelago Insurance Ltd* [2022] 2 CLJ 535; [2022] 2 MLJ 971 in which the courts there had held that the act of requesting for extension of time in view of preparing a defence can be deemed to be a step into proceedings and an abandonment of a right to arbitration.

**[63]** In stark contrast, Apex proffered the most recent 2024 decision of the Court of Appeal in *Airbus Helicopters Malaysia Sdn Bhd v. Aerial Power Lines Sdn Bhd* [2024] 4 CLJ 243; [2024] 2 MLJ 471 (which we find to be more

in line with the current paradigm shift to put parties to their bargain and upholding parties' mutual covenant to arbitrate their dispute). It must be kept in mind that the entirety of SKSB's complaint under this heading lies and rests on SKSB's blatant delinquency and breach of the arbitration clause (and as a general rule no party ought to be allowed to stake a case on their own breach or delinquency against a contract – see *Khatijah Abdullah & Ors v. Mohd Isa Biran* [2017] 7 CLJ 513; [2017] 2 MLJ 1; *Sangka Chuka & Anor v. Pentadbir Tanah Daerah Mersing, Johor & Ors* [2016] 4 CLJ 585; [2016] 8 MLJ 289). Hence the reason we are in resounding agreement with the latest Court of Appeal decision in *Airbus Helicopters* in light of a party's request for extension of time for preparation of defence (in the context of s. 10 of the Arbitration Act 2005):

> [52] The Federal Court in giving the above guidance was fully conscious of the fact that *there may well be cases where there had been a request for extension of time to file defence but that no defence was ever filed*. Such a request may be made orally at the date of the first case management or by way of a written letter to the plaintiff's solicitors or by way of a formal application for extension of time to file defence.
>
> [53] With the greatest of respect, *it would be too simplistic and indeed too strict an approach, steeped in technical traps, to say that a mere request for an extension of time to file defence would ipso facto tantamount to 'taking any other steps in the proceedings'. An approach consistent with the paradigm shift in encouraging parties to go for arbitration and to hold them to their bargain to so proceed in the arbitration agreement would resonate with the overall focus of s. 8 of the AA 2005* which is that no court shall intervene in matters governed by this Act, except where so provided in this Act. If we may be so bold as to say that *when intervention is allowed as in s. 10 of the AA it would be more predisposed to promoting the bargain earlier struck by the parties in favour of arbitration considering that the plaintiff had coyly commenced litigation in breach of the arbitration agreement without candidly communicating to the defendant that in spite of the bargain struck* it had now no intention of so arbitrating for whatever may be the reasons.
>
> (emphasis added)

**[64]** The Court of Appeal in *Airbus Helicopters* in its own words above also echoed the sentiment that s. 10 of the Arbitration Act 2005 ought not be read in manners in which would allow for 'intervention' stemming from the plaintiff's own delinquent and prior breach of a mutually agreed arbitration clause. We do not hesitate to prefer and agree with the same finding and sentiment of the Court of Appeal in *Airbus Helicopters*.

**[65]** The above considered under this heading, we accordingly answer issue 3 in the positive. The learned judge was certainly correct to find that Apex's requests for extensions of time did not effectively denote that Apex had abandoned its right to refer the dispute to arbitration.

A

## Our Decision

**[66]** All of the above deliberations considered, we find that there are merits in Apex's partial appeal (Appeal 1547) specifically against the learned judge's finding that the reference to arbitration under the arbitration clause was optional. Thus, we hereby allow Apex's partial Appeal 1547 and accordingly set aside the learned judge's decision specifically limited to the erroneous decision that the reference to arbitration under the arbitration clause (cl. 38) was optional.

**[67]** Considering our finding that the reference to arbitration is mandatory under the proper interpretation of the arbitration clause, we also set aside the learned judge's decision to dismiss Apex's encl. 7. We hereby allow encl. 7 and accordingly order that SKSB's suit before the High Court be stayed pending the reference of the dispute to arbitration in accordance with the terms of the arbitration clause.

**[68]** All of the above deliberations considered, we find that there are no merits in SKSB's partial appeal (Appeal 1704) specifically against the learned judge's astute finding that the two months' extension of time (or delay) requested by Apex/defendant was not an 'act' in furtherance of the court proceedings (or not an abandonment of the right to arbitrate the dispute). Thus, we hereby dismiss SKSB's Appeal 1704 and accordingly affirmed the learned judge's decision specifically limited to the astute decision that the two months' extension of time (or delay) requested by Apex/defendant was not an 'act' in furtherance of the court proceedings or abandonment of arbitration.

**[69]** We also accordingly order costs of RM30,000 per each appeal (in Appeal 1547 and Appeal 1704) (RM60,000 total costs) to be paid by SKSB to Apex, subject to allocator.

B C D E F G H I